No. 82-1651

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

CRISPUS NIX, WARDEN OF THE IOWA STATE PENITENTIARY,

Petitioner,

vs.

ROBERT ANTHONY WILLIAMS,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

BRIEF OF THE RESPONDENT

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QUESTIONS PRESENTED

1. Whether physical evidence that has been obtained as a direct and intended result of a violation of the Sixth Amendment right to counsel during interrogation nevertheless may be admitted at trial upon hypothetical "proof" that it is more likely than not that the evidence would have been obtained through lawful means.

2. Whether the Court of Appeals correctly concluded that *if* any hypothetical "inevitable discovery" doctrine could be constitutionally valid, it must include a requirement that the State prove "good faith".

3. Whether the Court of Appeals correctly concluded that the State had failed to show that a police officer acted in good faith when he violated the respondent's Sixth Amendment right to counsel.

4. Whether it is more likely than not that the evidence at issue would have been discovered through lawful means if the respondent's Sixth Amendment right to counsel had not been violated.

5. Whether *Stone* v. *Powell* should be extended beyond its Fourth Amendment context to apply to violations of the Sixth Amendment right to counsel.

6. Whether *Stone* v. *Powell* should be applied to state court decisions creating new exceptions to the exclusionary rule that would create constitutionally unacceptable incentives for future police misconduct.

7. Whether the respondent had a full and fair opportunity to litigate the merits in the state courts.

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STATEMENT OF THE CASE

In *Brewer* v. *Williams*, 430 U.S. 387 (1977), this Court held that the respondent's Sixth Amendment right to counsel was violated when a police officer, Detective Cletus Leaming, purposefully elicited the location of the victim's body from the respondent before he could consult with his attorney, contrary to an agreement with that attorney. The central issue in this case is whether evidence derived from the body as a direct result of this violation was properly admitted at the respondent's second trial. The Court of Appeals answered this question in the negative, and directed issuance of a conditional writ of habeas corpus. *Williams* v. *Nix*, 700 F.2d 1164 (8th Cir. 1983).

The *amicus curiae* brief of the United States adequately describes the proceedings below. (U.S. Br. 1-7). In the interests of brevity and clarity, this Brief will reserve detailed discussion of the evidentiary record for the relevant portions of the Argument, *infra*.

SUMMARY OF THE ARGUMENT

A. The evidence at issue in this case was obtained as a direct result of a violation of the respondent's Sixth Amendment right to counsel. The State argues that the evidence nevertheless should be admissible because it is more likely than not that the evidence would have been discovered by lawful means anyway. The State defends this hypothetical-probable-discovery doctrine by asserting that its impact on the deterrent function of the exclusionary rule would be relatively slight.

The central problem with the State's deterrence analysis—which derives from this Court's *Fourth* Amendment decisions—is that it is wholly inapplicable to *Sixth* Amendment violations such as the one involved in this case. Unlike the Fourth Amendment exclusionary rule, the essential purpose of which is to deter future police misconduct, the Sixth Amendment "exclusionary rule" is designed to protect the personal

right of the defendant to a fair trial. In particular, the right to counsel during "interrogation" is designed to protect the defendant from the state's attempts to elicit information from him for use *at trial* without his having the advice of a representative who can judge the impact of such evidence on the *trial;* indeed, there is no completed violation of the right to counsel until the evidence is admitted at trial. Consequently, the Sixth Amendment "exclusionary rule" is an integral and indispensable element of the right to counsel during "interrogation," and is not designed to deter future police misconduct.

Balancing the deterrent effect of excluding the evidence against the costs of doing so therefore is irrelevant to this case. Since it concededly was obtained as a direct and intended result of the same violation of the respondent's right to counsel that was involved in *Brewer* v. *Williams*, 430 U.S. 387 (1977), the evidence at issue in this case, like the evidence in *Brewer*, was constitutionally inadmissible.

B. Even if this were a Fourth Amendment case, the hypothetical-probable-discovery doctrine would not be constitutional. That doctrine would create a substantial incentive for police misconduct, because police officers would know that even if they used unlawful means to obtain evidence, it would still be useable at trial if the state could "prove" that the evidence probably would have been discovered anyway by hypothetical lawful means. When, as here, the evidence was physical evidence, such *post hoc* rationalization most often would be possible, since the state, with hindsight knowledge of the location of the evidence, would be able to hypothesize a suitably intensive investigation. And even if it turned out that the state could not "prove" hypothetical-probable-discovery, the officer would not have *lost* anything by his unlawful conduct.

C. The State's so-called "independent inevitable discovery" version of the hypothetical-probable-discovery doctrine—under which the State would have to show that the lawful means by which the evidence supposedly would have been discovered were actually in progress—would be no more con-

sistent with the purposes of the Sixth Amendment exclusionary rule, or with the deterrent purposes of the Fourth Amendment exclusionary rule. And in any event, the "independent inevitable discovery" doctrine would not apply to this case—since the only lawful search for the body that was actually in progress was not conducted in, or planned for, the county in which the body was located.

D. The hypothetical-probable-discovery doctrine is inconsistent with the Sixth Amendment "exclusionary rule" involved in this case regardless of whether the officer violated the defendant's right to counsel in good faith. Nevertheless, the Court of Appeals was correct in concluding that *if* any hypothetical-probable-discovery doctrine could be valid, it must include a requirement that the state show that the offending officer acted in good faith. Moreover, the Court of Appeals' conclusion that the State had not shown good faith was correct, under a subjective or objective standard, since Detective Leaming's specific purpose was to elicit information about the body before the respondent could reach his attorney—in violation of an agreement with that attorney.

E. Even under the broadest possible version of the hypothetical-probable-discovery doctrine, and regardless of Leaming's good faith, the evidence at issue would not be admissible because the record—which includes evidence introduced in the District Court showing that the state courts relied on false testimony presented by the State—demonstrates that the organized search for the body probably would not have discovered the body.

F. Because the Sixth Amendment "exclusionary rule" is an indispensable element of the right to counsel that is designed to protect the personal right of the defendant to a fair trial, the holding of *Stone* v. *Powell*, 428 U.S. 465 (1976)—which is based on the deterrent function of the Fourth Amendment exclusionary rule—does not apply to this case. Moreover, even from a Fourth Amendment deterrence standpoint, *Stone* should not apply because the broad new exception to the exclusionary rule on which the Iowa courts relied would create

significant incentives for future police misconduct. Finally, *Stone* would not preclude review on the merits because the respondent did not have a full and fair opportunity to litigate the merits in state court.

ARGUMENT

I. ADMISSION OF THE EVIDENCE AT ISSUE IN THIS CASE, WHICH WAS OBTAINED AS A DIRECT RESULT OF THE VIOLATION OF RESPONDENT'S RIGHT TO COUNSEL, WOULD VIOLATE THE SIXTH AMENDMENT REGARDLESS OF WHETHER THE EVIDENCE PROBABLY *WOULD* HAVE BEEN DISCOVERED IN ANY EVENT.

This Court previously has held that the respondent's Sixth Amendment right to counsel was violated when a police officer, Detective Cletus Leaming, purposefully elicited the location of the victim's body from the respondent before he could consult with his attorney. *Brewer* v. *Williams*, 430 U.S. 387 (1977). Moreover, it is undisputed that the discovery of the evidence at issue in this proceeding—all of which was connected with the body—was a direct and intended result of that violation. The admission of this evidence cannot be justified on the basis of any doctrine that this Court previously has recognized. Consequently, the petitioner and two of his *amici* ask this Court to adopt a broad new exception to the Sixth Amendment exclusionary rule under which evidence that was obtained as a result of a violation of the Sixth Amendment right to counsel nevertheless would be admissible if the State could "prove," hypothetically, that the evidence more likely than not *would*[1]

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[1] The United States, as *amicus curiae*, attempts to make the proposed new exception seem less speculative by arguing that its test is a "strict" one of whether the evidence *would* have been discovered. (U.S. Br. 16, n.8). At the same time, however, the United States argues that the appropriate burden of proof on this issue is the "preponderance of the evidence" standard that was used by the Iowa courts. *(Id.)* Plainly, the juxtaposition of this burden of proof with the underlying substantive test results in a doctrine under which the state be required to "prove" only that the evidence *probably* would have been discovered.

have been discovered by lawful means even if the violation had not occurred. Although this new exception has been called the "inevitable discovery" doctrine, a more descriptive label would be the "hypothetical probable discovery" doctrine. Under any name, this doctrine would be wholly inconsistent with the fundamental purposes of the Sixth Amendment right to counsel.

A. The most obvious—and fundamental—flaw in the briefing of the petitioner with regard to the "inevitable discovery" issue is that he treats this case as if it involved the *Fourth* Amendment exclusionary rule, with no attention to the implications of its *Sixth* Amendment context. Thus, the Petitioner seeks to justify adoption of his version of the hypothetical-probable-discovery doctrine[2] by arguing that the impact of that doctrine on the deterrent function of the exclusionary rule would be too small to outweigh the costs of excluding the evidence in question here. (Pet. Br. 10-17). However, this deterrence/balancing approach is completely inapplicable to violations of the Sixth Amendment right to counsel.

1. This Court has made it clear that the Fourth Amendment exclusionary rule is not designed to protect or vindicate any personal right of the defendant in a criminal case; nor is it justified by a need to protect the integrity of the criminal judicial process. Rather, the primary justification for the judicially-created Fourth Amendment exclusionary rule is the general deterrence of future police misconduct outside the context of formal judicial proceedings. *See, e.g., Stone* v. *Powell*, 428 U.S. 465, 486 (1976); *United States* v. *Janis*, 428 U.S. 433, 466 (1976). By contrast, as the following paragraphs

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[2] The petitioner—but not his *amici*—proposes a minor variation on the hypothetical-probable-discovery doctrine, which he calls "independent inevitable discovery," under which the state must show that a lawful investigation aimed at discovering the evidence in question was actually underway. (Pet. Br. 11-17). As Division III, *infra*, will show, this variation is no more valid constitutionally than the basic hypothetical-probable-discovery doctrine described above—and in any event would not apply to the facts of this case.

will show, the *Sixth* Amendment "exclusionary rule" involved in this case is designed to protect the personal rights of defendants in formal judicial proceedings, and the fairness and integrity of the trial itself, and therefore does not depend on a deterrence rationale.

2. The right of a criminal defendent to the assistance of counsel is a fundamental right that is "indispensable to the fair administration of our adversary system of criminal justice." *Brewer* v. *Williams*, 430 U.S. 387, 398 (1977); *see also Coleman* v. *Alabama*, 399 U.S. 1 (1970); *Massiah* v. *United States*, 377 U.S. 201 (1964); *Powell* v. *Alabama*, 287 U.S. 45 (1932). Unlike the Fourth Amendment, the Sixth Amendment right to counsel necessarily involves the judicial process, since that right does not attach until formal adversary proceedings have commenced. *See, e.g., Kirby* v. *Illinois*, 406 U.S. 682 (1973).[3] Of course, the right to counsel applies to any critical pretrial stage of a criminal proceeding; but the essential function of counsel during the pre-trial stages is to protect and preserve the ability of counsel to provide meaningful assistance *at trial*. *Massiah* v. *United States*, *supra*, at 204; *Coleman* v. *Alabama*, *supra*, at 7.

In an "interrogation" case like this one, the purpose of the defendant's right to counsel is to protect him from the state's post-initiation efforts to obtain evidence from him for use *at trial* without his having the advice of a representative who is knowledgeable in the law and able to judge the impact of such evidence on the ability to defend *at trial*. *Brewer* v. *Williams*, *Massiah* v. *United States*, *supra*. Indeed, there is no completed violation of the right to counsel until evidence that has been obtained in the absence of counsel is admitted at the defendant's trial. Thus, in *Massiah*, this Court indicated that

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[3] "The initiation of judicial criminal proceedings is far from a mere formalism. It is the starting point of our whole system of adversary criminal justice. . . . It is then that a defendant finds himself faced with the judicial forces of organized society, and immersed in the intricacies of substantive and procedural criminal law." *Kirby* v. *Illinois*, *supra*, at 689.

the government was permitted to elicit information from an indicted suspect in the absence of counsel for investigative purposes, so long as it did not use the information "as evidence against *him* at his trial." 377 U.S. at 207. *See also Weatherford* v. *Bursey*, 429 U.S. 545 (1977) (no § 1983 cause of action for violation of right to counsel unless evidence derived from official misconduct used at trial).

3. Since the right to counsel is designed to protect the defendant from the use at trial of evidence elicited from him in the absence of counsel, it is tautological that this right would have no meaning if the state could engage in the prohibited conduct and then use the resulting evidence against the defendant at trial. Hence, the Sixth Amendment right to counsel, unlike the Fourth Amendment right to be free from unreasonable searches and seizures outside the judicial process, necessarily requires exclusion from the trial of evidence that has been obtained as a result of a violation of that right.

> [T]he *Massiah* "exclusionary rule" is not merely a prophylactic device; it is not designed to reduce the *risk* of actual constitutional violations and is not intended to deter any pretrial behavior whatsoever.

Schulhofer, *Confessions and the Court*, 79 Mich. L.Rev. 865, 889 (1981).

4. Given that an "exclusionary rule" is an integral and indispensable element of the Sixth Amendment right to counsel at post-initiation "interrogations," the "balancing" approach relied on by the petitioner to defend the hypothetical-probable-discovery doctrine—an approach that derives from the purely deterrent purposes of the *Fourth* Amendment exclusionary rule—is completely inapposite to this case. The validity of this conclusion is supported by *New Jersey* v. *Portash*, 440 U.S. 450 (1979), in which this Court held that statements obtained from a defendant pursuant to a grant of use immunity were not admissible to impeach the defendant at trial. In *Portash*, this Court explicitly rejected the use of the "balancing" approach under which it had held that evidence obtained as a result of violations of the prophylactic rules of

Miranda v. *Arizona*, 384 U.S. 436 (1966), was admissible to impeach. While *Portash* dealt with a Fifth Amendment violation, its reasoning applies with full force to evidence obtained in violation of the Sixth Amendment right to counsel. Just as the Fifth Amendment necessarily includes a personal right not to have evidence that the defendant has been compelled to provide (even at a pre-trial stage) admitted at trial, the preceding paragraphs have demonstrated that the Sixth Amendment necessarily includes a personal right not to have information that has been elicited in violation of the defendant's right to counsel admitted at trial—without regard to any balancing of interests. Schulhofer, *supra*, at 889-90; *see also United States* v. *Brown*, 699 F.2d 585, 589-90 (2d Cir. 1983) (evidence obtained in violation of defendant's Sixth Amendment right to counsel not admissible to impeach); *United States* v. *Henry*, 447 U.S. 264 (1980) (excluding evidence obtained in violation of Sixth Amendment right to counsel in § 2255 proceeding).[4]

5. The constitutional inadmissibility of the evidence in this case is made particularly clear by the fact that Leaming's conduct obviously and admittedly was designed to produce exactly the kind of evidence that it did produce before Williams could reach his attorney. Indeed, it is apparent that Leaming's conduct had *no* purpose other than gathering evidence for use at trial, such as discovering the victim alive—since Leaming testified at the 1969 suppression hearing that he knew the victim was dead. (App. to *Brewer* v. *Williams* at 96). Since the evidence at issue in this case, precisely like the evidence involved in *Brewer* v. *Williams*, *supra*, was obtained as a direct and intended result of the violation of the respondent's Sixth Amendment right to counsel, effectuation of that right required that the State not have the benefit of the evidence at trial; in short, this case is indistinguishable from *Brewer* itself.

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[4] In connection with *Portash*, it should be noted that the District Court in the first habeas corpus proceeding held that the respondent's Fifth Amendment rights were violated, in that his statements to Leaming were involuntary. *Williams* v. *Brewer*, 375 F. Supp. 170, 179-84 (S.D. Iowa 1974).

B. The preceding analysis makes any consideration of lower court authority technically superfluous. Nevertheless, the respondent would note that the claims of the petitioner and the United States that all of the federal courts of appeals have "embraced" or "endorsed" an "inevitable discovery" doctrine "in one form or another" (Pet. Br. 10; U.S. Br. 10) are at best misleading, for several reasons:

1. Most significantly, none of the cases cited by the petitioner—or any other Circuit Court decisions that the respondent has been able to locate—involved evidence obtained as a result of violations of the Sixth Amendment right to counsel.[5] As Division I(A), *supra*, has demonstrated, the "balancing" approach on which the hypothetical-probable-discovery doctrine purports to rest is wholly inapplicable to Sixth Amendment violations.

2. In the overwhelming majority of the cases cited by the petitioner and the United States, the courts' references to the "inevitable discovery" doctrine were mere dictum, since the courts already had held either that there had been no constitutional violation in the first place[6] or that the "independent

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[5] In *Government of the Virgin Islands* v. *Gereau*, 502 F.2d 914 (3d Cir. 1974), *cert. denied*, 420 U.S. 909 (1975), the court noted that law enforcement officers denied a defendant's request for counsel before interrogating him. However, because the interrogation took place before this defendant was arraigned, *id.* at 920-921, the interrogation could not have violated the Sixth Amendment. Although the court of appeals did not specify the respect in which the defendant's rights were violated, it appears that the violation was of the prophylactic rule of *Miranda* v. *Arizona*, 384 U.S. 436 (1966). Violations of prophylactic rules are of course subject to a deterrence/balancing analysis. *See Harris* v. *New York*, 401 U.S. 222 (1971).

[6] *Wayne* v. *United States*, 318 F.2d 205 (D.C. Cir.), *cert. denied*, 375 U.S. 860 (1963); *United States* v. *Fisher*, 700 F.2d 780 (2d Cir. 1983); *United States* v. *Soehnlein*, 423 F.2d 1051 (4th Cir.), *cert. denied*, 399 U.S. 913 (1970); *United States* v. *Wiga*, 662 F.2d 1325 (9th Cir. 1981), *cert. denied*, 456 U.S. 918 (1982) ("inevitable discovery" referred to in footnote, 662 F.2d at 1333, n.9). *See also Papp* v. *Jago*, 656 F.2d 221 (6th Cir. 1981) (apparently holding underlying *Miranda* violation harmless error).

source" or "attenuation" exception applied.[7] Moreover, in the three cases in which the "inevitable discovery" doctrine appears to have been a necessary part of the court's analysis—all of which involved Fourth Amendment or *Miranda* violations—the courts used a much higher burden of proof than the preponderance-of-the-evidence standard applied by the Iowa courts in this case.[8]

3. Decisions in several of the circuits have indicated *dis*approval of an "inevitable discovery" exception.[9] Within those circuits there are, at best, inter-panel disagreements with regard to the "inevitable discovery" doctrine that have not been resolved through in banc decisions.

C. Given the Court of Appeals' approach to this case (see Division IV, *infra*), it should be noted that the preceding analysis applies regardless of whether Detective Leaming could be said somehow to have acted in good faith. There is nothing in the nature or purpose of the right to counsel that

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[7] *United States* v. *Bienvenue*, 632 F.2d 910 (1st Cir. 1980); *United States* v. *Fisher*, *supra*; *United States* v. *Brookins*, 614 F.2d 1037 (5th Cir. 1980); *United States ex rel. Owens* v. *Twomey*, 508 F.2d 858 (7th Cir. 1974); *United States* v. *Schmidt*, 573 F.2d 1057 (9th Cir.), *cert. denied*, 439 U.S. 881 (1978) ("inevitable discovery" mentioned in footnote, 573 F.2d at 1065-66, n.9); *United States* v. *Huberts*, 637 F.2d 630 (9th Cir. 1980), *cert. denied*, 451 U.S. 975 (1981); *United States* v. *Kandik*, 633 F.2d 1334 (9th Cir. 1980); *United States* v. *Roper*, 681 F.2d 1354 (11th Cir. 1982) (applying "inevitable discovery" in situation in which search was valid as incident to arrest).

[8] *Government of the Virgin Islands* v. *Gereau*, 502 F.2d 914, 927 (3d Cir. 1974), *cert. denied*, 420 U.S. 909 (1975) (requiring "clear and convincing" evidence); *United States* v. *Apker*, 705 F.2d 293, 307 (8th Cir. 1983) ("illegal warrant *clearly* did no more than hasten the discovery of the guns"); *United States* v. *Romero*, 692 F.2d 699, 704 (10th Cir. 1982) (danger of admitting evidence on basis of speculation diminished when, "as here, the evidence *clearly* would have been discovered within a short time").

[9] *See Bynum* v. *United States*, 262 F.2d 465 (D.C. Cir. 1958); *United States* v. *Alvarez-Porras*, 643 F.2d 54, 62-65 (2d Cir. 1981); *United States* v. *Paroutian*, 299 F.2d 486, 489 (2d Cir. 1962); *United States* v. *Houltin*, 525 F.2d 943, 950 (5th Cir. 1976); *United States* v. *Griffin*, 502 F.2d 959 (6th Cir. 1974); *United States* v. *Hoffman*, 607 F.2d 280, 285-86 (9th Cir. 1979).

indicates that "good faith" violations of that right are constitutionally acceptable, and this Court has never suggested that good faith is an issue in cases involving the Sixth Amendment "exclusionary rule." *See United States* v. *Henry; Brewer* v. *Williams; Massiah* v. *United States, supra.*

II. EVEN IF THIS WERE A FOURTH AMENDMENT CASE, THE HYPOTHETICAL-PROBABLE-DISCOVERY DOCTRINE WOULD BE CONSTITUTIONALLY INVALID

A. The preceding Division has demonstrated that the hypothetical-probable-discovery doctrine would be inconsistent with the Sixth Amendment right to counsel involved in this case, and that the evidence at issue therefore was constitutionally inadmissible. Of course, this point by itself requires affirmance of the Court of Appeals' decision. But even if one accepted the petitioner's incorrect premise that the Sixth Amendment "exclusionary rule," like its Fourth Amendment counterpart, served only a general deterrence function, adoption and application of a hypothetical-probable-discovery exception in this case would be improper.

1. As previously noted, the essential justification for the Fourth Amendment exclusionary rule is that it will remove a primary incentive for police misconduct. Consistently with this rationale, this Court has recognized some situations in which the Fourth Amendment exclusionary rule will not apply. For example, under the "independent source" doctrine, evidence that *in fact* has been derived from a source independent of police misconduct need not be suppressed. *United States* v. *Crews*, 445 U.S. 463 (1980); *Silverthorne Lumber Co.* v. *United States*, 251 U.S. 385 (1920).[10] This Court's decisions

[10] For other "exceptions" to the Fourth Amendment exclusionary rule, *see, e.g., Wong Sun* v. *United States*, 371 U.S. 471 (1963) ("attentuation" doctrine); *United States* v. *Havens*, 446 U.S. 620 (1980) (evidence obtained in violation of Fourth Amendment admissible to impeach defendant in some circumstances); *United States* v. *Calandra*, 414 U.S. 338 (1974) (evidence obtained in violation of Fourth Amendment admissible in grand jury proceedings).

recognizing "exceptions" to the Fourth Amendment exclusionary rule have rested on the conclusion that when those exceptions applied, the incremental deterrent effect of excluding the challenged evidence was not significant, and therefore did not outweigh the competing costs of excluding relevant evidence. In proposing the adoption of a new hypothetical-probable-discovery exception in this case, the petitioner and his *amici* assert that this exception would not have any significant impact on the deterrent function of the exclusionary rule. However, the paragraphs that follow will show that such an exception in fact would emasculate the exclusionary rule's deterrent function, especially in cases such as this one.

2. From a Fourth Amendment deterrence standpoint, the infirmity of the hypothetical-probable-discovery doctrine is that it would create a strong incentive for an officer (like Detective Leaming in this case) to use unlawful means to gain evidence for use against a criminal defendant:

a. When the officer believed that there was a substantial likelihood that the evidence also could be obtained by lawful means, the hypothetical-probable-discovery doctrine would destroy the incentives otherwise created by the exclusionary rule against the use of unlawful means—since the officer would know that even if he used such unlawful means, the evidence he obtained nevertheless would be admissible when the prosecution showed that the evidence probably would have been obtained anyway through lawful means.

b. This incentive to engage in unlawful conduct is perhaps most apparent when the likelihood that the evidence was discoverable by lawful means is relatively high. But even when the officer had substantial doubts that the evidence would be obtained lawfully, the hypothetical-probable-discovery doctrine would provide a strong incentive to use the contemplated unlawful means, for two complementary reasons:

i. First, quite apart from the officer's assessment of the likelihood that the evidence actually would be obtained by lawful means, the officer most often would be able to anticipate

that after the evidence was discovered by unlawful means, the state, with the benefit of hindsight, would be able to make out an effective hypothetical case that lawful investigative methods would have produced the evidence in any event. This would be especially true when, as in this case, the evidence was physical evidence the only barrier to the discovery of which was knowledge of its location: Once the evidence was discovered by unlawful means, the state could, without purposeful after-the-fact fabrication, hypothesize as intensive a lawful investigation as it wished, since actual historical facts would not stand in the way. As Division III, *infra*, will show, the record in this case vividly illustrates how readily the hypothetical-probable-discovery doctrine's potential for *post hoc* rationalization can be realized.

ii. Second, whatever the officer's doubts that the evidence could be obtained through lawful means, he would realize that even if the prosecution was not able later to "prove" hypothetical-probable-discovery through lawful means, his engaging in unlawful conduct would not render inadmissible any evidence that otherwise would have been available for use at trial. To use a gambling analogy, the hypothetical-probable-discovery doctrine at minimum would make unlawful conduct a "heads we win, tails we tie" proposition.

c. Contrary to the suggestion of the petitioner (Pet. Br. 13), the difference between the "independent source" doctrine and the hypothetical-probable-discovery doctrine is not simply an empty difference of timing. Under the "independent source" doctrine, the officer in question will realize that the evidence in question will be admissible only if the evidence in fact *is* discovered through legal means—and *not* as a result of the officer's illegal conduct. Moreover, the officer will realize that if he engages in illegal conduct that is "successful" in producing evidence, the prosecution's ability to use that evidence through the "independent source" route will be destroyed. As a result, the independent source doctrine provides a *dis*incentive for the officer to seek evidence through illegal means.

Under the hypothetical-probable-discovery doctrine, however, the officer would realize that even if he engaged in unlawful conduct, the resulting evidence would be admissible if the prosecution could "show" that the evidence probably *would* have been discovered anyway, through "proof" that could be created after the fact. Moreover, the officer would realize that his "successful" use of unlawful methods would not destroy the prosecution's ability to construct such speculative "proof." Indeed, by discovering the evidence through unlawful means—and thereby eliminating any possibility of knowing what really would have happened in the absence of the illegality—the officer would actually enhance the ability of the state to *speculate* about what would have happened.

d. As the preceding analysis demonstrates, if there were any situations in which the doctrine would not produce a significant incentive to engage in unlawful conduct, they would be only those situations in which discovery of the evidence through lawful means was so unlikely that the doctrine in any event would not be applicable. Plainly, a doctrine that is constitutionally acceptable only in cases in which it has no application is not a sensible doctrine.

3. While "bad faith" police misconduct may be especially suitable for deterrence, nothing in the foregoing deterrence analysis depends on whether the officer acted in bad faith. This is of course consistent with this Court's decisions, which have not made application of the Fourth Amendment exclusionary rule turn on the bad faith of the offending officer. But even if bad faith were an issue, it would not matter in this case. See Division IV, *infra*.[11]

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[11] The societal costs of excluding evidence in cases to which the hypothetical-probable-discovery doctrine would apply provide no justification for the adoption of that doctrine, since those costs certainly are no *greater* than those of excluding unlawfully obtained evidence in any other cases. Indeed, the exclusionary rule need not cost the state *anything* in hypothetical-probable-discovery situations—since whenever it is true that evidence is discoverable by lawful means, the state will not be deprived of its use so long as its agents observe the constitution.

B. The defense of the hypothetical-probable-discovery doctrine by the United States as *amicus curiae* relies in part on an abstract discussion of the concept of causation. The United States concedes, as it must, that the Sixth Amendment violation previously recognized by this Court was the "*de facto*" cause of the discovery of the evidence in question. But the United States argues that when evidence probably would have been discovered even in the absence of a constitutional violation, the violation was not the "*legal*" cause of the discovery—and that this asserted lack of "legal" causation renders the evidence constitutionally admissible. (U.S. Br. 13-14). For at least two basic reasons, this argument is without merit:

1. Perhaps most obviously, the United States' "legal causation" argument fails to address the effect of the hypothetical-probable-discovery doctrine on the fundamental non-deterrent purposes of the Sixth Amendment "exclusionary rule." Moreover, as the preceding paragraphs have shown, allowing evidence that in fact had been discovered as a result of unconstitutional conduct to be admitted at trial under an hypothetical-probable-discovery exception would provide a significant incentive to law enforcement officers to engage in such conduct—quite apart from whether hypothetical probable discovery would eliminate "legal" causation.

2. In any event, the "legal causation" argument fails even on its own terms. For one thing, the tort-law examples that the United States derives from Professor Prosser (U.S. Br. 13) simply are not analogous to this case. The respondent would not dispute that "[a] failure to fence a hole in the ice plays no part in causing the death of runaway horses which could not have been halted if the fence had been there." (*Id.*). However, the essential feature of this example is that the unlawful conduct (failing to fence the hole) did not in fact produce the result at issue—the death of the horses. By contrast, Detective Leaming's unlawful conduct concededly *did* in fact produce the result at issue—the discovery of the evidence connected with the body. Within the law of torts, a more apt analogy to this case would be a situation in which A sells a rope to C, "who is

bent on hanging himself," but A then shows that B would have sold rope to C if he had not done so. In this example, A's conduct *is* a "legal" cause of C's death—even though that death would have occurred even if A had not engaged in that conduct. W. Prosser, *Law of Torts* § 41, 244, n.9 (3d ed. 1964).

The example discussed above illustrates a more general problem with the United States' "causation" argument—namely, that even in the law of torts, "causation" is not determined simply by a hypothetical "but for" test. Rather, conduct "is a cause of an event if it was a material element and a substantial factor in bringing it about." *Id.* at 244; *see also Restatement (Second of Torts)* § 431 (1965). The same test applies as well in the criminal law. *See* W. LaFave & A. Scott, Jr., *Criminal Law* § 35, at 249-250 (1972).[12] In this case, of course, there is no dispute that the violation of the respondent's Sixth Amendment right to counsel was "a material element and a substantial factor" in bringing about the discovery of the evidence in question.[13]

III. THE PETITIONER'S PROPOSED "INDEPENDENT INEVITABLE DISCOVERY" VARIATION ON THE HYPOTHETICAL-PROBABLE-DISCOVERY DOCTRINE WOULD NOT RENDER THAT DOCTRINE CONSTITUTIONALLY MORE VALID—AND IN ANY EVENT WOULD NOT APPLY TO THE FACTS OF THIS CASE

While the United States argues for a hypothetical-probable-discovery doctrine that would apply whenever the prosecution could "prove" that the challenged evidence probably would

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[12] To take a criminal law analogy, suppose that D pushes V off a cliff to his death—but that if he had not done so, a runaway truck would, at the same moment, have struck V and caused his death even sooner than the fall. In this situation, D would not be able to escape liability on the ground that his conduct did not "cause" V's death—even though the truck *would* have killed V just as quickly anway. *See id.*

[13] Under the "independent source" doctrine, by contrast, the illegal conduct is not a factor, substantial or otherwise, in bringing about the discovery of the evidence.

have been lawfully discovered in any event (U.S. Br. 10-15), the petitioner attempts to distinguish "three separate and distinct factual contexts" involving hypothetical probable discovery, and then defends only the one he dubs "independent inevitable discovery." (Pet. Br. 11). The essential characteristic of the "independent inevitable discovery" situation is that "lawfully obtained leads totally independent of collateral illegal conduct are in fact being aggressively pursued by law enforcement." Admission of evidence that in fact is discovered as a result of the illegal conduct supposedly is justified in this situation because "courts are not asked to speculate about whether police would have actually launched the legitimate investigative efforts. . . ." (*Id.*)

The petitioner's attempt to justify admission of the evidence at issue in this case under his so-called "independent inevitable discovery" doctrine is fatally flawed in several respects:

A. First, and most obviously, the "independent inevitable discovery" doctrine—which the petitioner defends solely on the basis of a Fourth Amendment deterrence analysis—is inconsistent with the fundamental non-deterrent purposes of the Sixth Amendment "exclusionary rule" involved in this case: the addition of a requirement that the state show that a lawful investigation was actually underway makes no difference to the Sixth Amendment analysis outlined in Division I, *supra*.

B. Second, even if this were a Fourth Amendment case, the impact on the exclusionary rule's deterrent function of the "independent inevitable discovery" doctrine would be the same as that of the basic hypothetical-probable-discovery doctrine discussed in Division II(A), *supra*. Indeed, if an officer was aware that a lawful investigation aimed at discovering certain evidence was underway, he would have even less reason to eschew unlawful means of obtaining the same evidence—since he could be more confident that the prosecution later would be able to "prove" that the evidence would have been discovered anyway by means of the ongoing lawful investigation. And if the officer was not aware of the ongoing lawful investigation, it could not affect his conduct at all.

C. Finally, even if one assumed for purposes of argument that the petitioner's "independent inevitable discovery" exception was constitutionally more acceptable than a more general hypothetical-probable-discovery exception, it would not apply to the facts of this case. Under the petitioner's own rationale, his "narrow" exception can apply only if it is clear that an independent, legal investigation in fact was proceeding toward discovery of the evidence in question; speculation will not be reduced if all that is known is that some investigation was underway, with no assurance that it was headed toward the right place.[14] Apparently recognizing this point, the petitioner characterizes the record as showing that a search for the victim's body that had been undertaken by the Iowa Bureau of Criminal Investigation (BCI) was proceeding inexorably toward discovery of the body when Williams, at Leaming's behest, led the police to it. (Pet. Br. at 12). The problem with this characterization is that it simply is incorrect, as a closer examination of the petitioner's misleading assertions demonstrate:

1. The petitioner cites to testimony given in the 1977 suppression hearing by the BCI agent in charge of the search, Thomas Ruxlow, for the proposition that the police theorized that the body "may have been disposed of along Interstate 80 somewhere between Grinnell and Des Moines" (Pet. Br. 12, citing App. 33), and asserts that Ruxlow, "directing 200 volunteers in a thorough, painstaking search in central Iowa, was on the verge of discovering the body. . . ." (*Id.*) In order for these assertions to have any relevance to the petitioner's "independent inevitable discovery" theory, they must be intended to create the impression that it was clear that the BCI search was planned for the entire area of "central Iowa" between Grinnell and Des Moines, including the portion of Polk County in which the body was located. However, the record flatly contradicts this impression:

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[14] Even when it is clear that an ongoing investigation was headed in the right direction, it will still be speculative whether it would have succeeded—as the record in this case clearly illustrates, see Division V(B), *infra*.

a. In fact, the portion of the record cited by the petitioner (App. 33) contains no testimony by Ruxlow that the police theorized that the body would be between Grinnell and Des Moines. Ruxlow refers only to Grinnell, and then to explain why the "areas to be searched [were] . . . in Jasper and Poweshiek County" (App. 32)—the next two counties east of Polk County. Moreover, any theory that the body was between Grinnell and Des Moines would have been inconsistent with the fact that the search started in Poweshiek County (App. 33)—more than 90% of which lies *east* of Grinnell.[15]

b. Both of the reports filed by the BCI agents involved in the search state that a search was planned for Jasper and Poweshiek Counties, with *no* mention of Polk County. (App. 112-121). Moreover, the agents made preparations to search only with regard to Jasper and Poweshiek Counties. (App. 31-33, 144).

c. In noting that "[t]he Ruxlow group . . . had reached a spot only two and one half miles from the culvert where the girl's body rested" (Pet. Br. 12), the petitioner omits the fact that the "spot" that the BCI search reached was the Jasper/Polk County border—i.e., the end of the precise area that Ruxlow had planned and prepared to search. (App. 33-34). Just as the searchers reached this point, at 3:00 p.m., Ruxlow abandoned it to meet Detective Leaming at the Grinnell interchange on Interstate 80. Ruxlow then followed Leaming west on I-80 toward Des Moines, having made no provision for continuing the search in his absence. (App. 33-34, 48, 54-55, 133).

2. The petitioner concludes his discussion of the BCI search with the following sentences:

> At a time when discovery of Pamela Powers' body by Ruxlow and his volunteers was imminent, Williams agreed to lead officials to the body. The legal search,

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[15] Des Moines is approximately 45 miles *west* of Grinnell.

> which the trial court found would have otherwise continued, was terminated.

(Pet. Br. 12). These sentences appear to assert that the BCI search was terminated *after* Williams agreed to lead the police to the body.[16] The record, however, is undisputably to the contrary. It is clear from Leaming's own testimony that when he and Ruxlow left the Grinnell interchange to drive west on I-80, Williams had *not* yet indicated that he would lead the police to the body. *Brewer* v. *Williams*, 420 U.S. 387, 393 (1977). Moreover, Ruxlow admitted in the District Court proceeding that when he abandoned the search and followed Leaming, he had not been told that Williams would lead the police to the body. (App. 148).

3. The *only* "evidence" in the record that indicates that the BCI *would* have searched in Polk County is Ruxlow's testimony to that effect at the 1977 suppression hearing. (App. 33). But before the hearing, Ruxlow had been told by the prosecution that "they need my maps and my testimony to demonstrate" that his search would have discovered the body (App. 152-153). Moreover, Ruxlow demonstrated a lack of candor at the suppression hearing when he testified that State's Exhibit D (introduced in the District Court as Habeas Ex. 5, App. 108), a photograph taken at the scene in which the body is plainly visible, showed the body "exactly as it was found," without any snow removed. (App. 39). During the proceedings in the District Court, Ruxlow conceded that Exhibit D actually depicted the scene after snow had been trampled down and brushed away from the body (App. 139-140)—a fact which in any event was apparent from Habeas Exhibit 1 (App. 106), a photograph which was uncovered by the respondent's counsel during the pendency of the proceedings in the District Court (App. 104-105), and which shows the body completely covered with snow and brush.

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[16] This assertion is made more directly by the United States (U.S. Br. 17-18).

4. In short, any conclusion that the BCI search efforts probably *would* have included the area in which the body was found at best must be based on precisely the kind of *post hoc* rationalization that the petitioner's theory is supposed to avoid. Consequently, even if this Court were to adopt the "independent inevitable discovery" doctrine—which is the only version of the hypothetical-probable-discovery doctrine that the petitioner himself is willing to defend—it would not apply to this case.

IV. THE COURT OF APPEALS CORRECTLY HELD THAT THE EVIDENCE AT ISSUE WAS INADMISSIBLE BECAUSE THE STATE FAILED TO SHOW THAT DETECTIVE LEAMING ACTED IN GOOD FAITH

The Court of Appeals did not reach the issue of the validity of the hypothetical-probable-discovery doctrine. Instead, it held that *if* any such doctrine could constitutionally exist, it must include a requirement that the prosecution prove that the officer whose unlawful conduct produced the evidence in question acted in good faith; the Court of Appeals then held that the State had failed to prove good faith. 700 F.2d at 1169-73. Of course, preceding Divisions of this Brief have shown that no "good faith" inquiry is necessary in this case, since the hypothetical-probable-discovery doctrine is invalid quite apart from the offending officer's good faith—especially in cases involving the Sixth Amendment right to counsel during "interrogation." In the respondent's view, Division I, *supra*, provides the most direct—and analytically appropriate—basis for decision in this case. At the same time, however, the Court of Appeals' analysis and conclusion also were proper.[17]

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[17] The decisions of the United States Courts of Appeals that have referred to the "inevitable discovery" doctrine are not inconsistent with the Eighth Circuit's "good faith" analysis in this case. A number of Circuit Court opinions that have discussed "inevitable disovery" have emphasized the issue of the good faith of the officers involved. *See United States* v. *Bacall*, 443 F.2d 1050, 1057 (9th Cir.), *cert. denied*, 414 U.S. 1004 (1971); *United States* v. *Bienvenue*, 632 F.2d 910 (1st Cir. 1980); *United States* v. *Edmons*, 432 F.2d

(Cont. next page)

A. If Any Hypothetical-Probable-Discovery Doctrine Were Constitutionally Valid, It Would Have To Include A Good Faith Inquiry

1. In demonstrating the validity of the Court of Appeals' analysis in this case, it will be useful to begin with an examination of two recent decisions of this Court involving the "attenuation" doctrine: *Brown* v. *Illinois*, 422 U.S. 690 (1975), and *Dunaway* v. *New York*, 442 U.S. 200 (1979). In both *Brown* and *Dunaway*, this Court held that statements that were obtained from defendants after they were illegally arrested were improperly admitted at trial, even though the statements were preceded by *Miranda* warnings and apparently were voluntary. 422 U.S. at 604-605; 442 U.S. at 218-19. *See also Taylor* v. *Alabama*, ___ U.S. ___, 102 S.Ct. 2664 (1982).

In *Brown* and *Dunaway* this Court focused on whether the challenged evidence was obtained through *exploitation* of the initial illegality, rather than by lawful means sufficiently attenuated from the illegality to dissipate its taint. This Court articulated three factors to be considered in connection with that question: (1) the "temporal proximity" of the illegality to the evidence; (2) "the presence of intervening circumstances"; (3) "*particularly*, the *purpose* and *flagrancy* of the official misconduct. . . ." (Emphasis added). This Court explicitly noted that "the burden of showing admissibility rests, of course, on the prosecution." 422 U.S. at 603-604.[18]

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577 (2d Cir. 1970); *Gissendanner* v. *Wainwright*, 482 F.2d 1293 (5th Cir. 1973); *United States* v. *Roper*, 681 F.2d 1354 (11th Cir. 1982). *See also United States* v. *Alvarez-Porras*, 643 F.2d 54, 58-66 (2d Cir. 1981) (rejecting use of "inevitable discovery" doctrine, but emphasizing good faith of officers). Moreover, in those decisions that have not discussed "good faith," the issue simply has not been raised; no circuit court opinion has *rejected* a good faith inquiry in connection with the "inevitable discovery" doctrine. See also text accompanying nn.6-9, *supra*.

[18] The evidence at issue in this case obviously would be inadmissible under *Brown* and *Dunaway*. The petitioner does not argue to the contrary.

The factor of the "purpose and flagrancy" of the offending officer's conduct—which *Brown* and *Dunaway* identify as being of particular importance—is simply the other side of the coin of "good faith." *Dunaway* v. *New York*, *supra*, at 221 (Stevens, J., concurring), 226 (Rehnquist, J., dissenting). If a hypothetical-probable-discovery exception to the Sixth Amendment exclusionary rule were to be recognized at all, there would be no less reason to consider "good faith" under that exception than under the "attenuation" doctrine. Indeed, since the emasculating effects on the Sixth Amendment exclusionary rule of the hypothetical-probable-discovery doctrine are potentially far more serious than those of the attenuation doctrine, there is *more* reason to include a good faith inquiry in the former than in the latter.

2. Quite apart from the preceding analogy to the "attenuation" doctrine, from the petitioner's own Fourth Amendment deterrence standpoint, purposeful and flagrant violations of constitutional rights are especially deserving of deterrence. And while good faith is irrelevant to a proper Sixth Amendment analysis, see Division I, *supra*, it might also be said that the admission of the evidentiary fruits of a bad faith violation of the right to counsel would be *especially* destructive of that right.

3. The foregoing does not address whether the good faith of the offending officer is a subjective or objective issue. The Court of Appeals concluded that the question was subjective, 700 F.2d at 1170-71, while the United States argues that the question should be purely objective (U.S. Br. 26-27). The respondent agrees with the United States that any "good faith" inquiry should include an objective "reasonableness" element.[19] At the same time, however, even when a hypothe-

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[19] An objective good faith inquiry would be appropriate and necessary because restricting the good faith issue to the subjective state of mind of the officer effectively would reward untrained and unreasonable officers, and would encourage violations of constitutional rights in the hope that the courts could be persuaded that the officer *believed*, however unreasonably, that his conduct was constitutional.

tical reasonable officer could have believed that certain conduct was lawful, there would be no reason to allow into evidence the fruits of that conduct when the actual officer in question subjectively—and correctly—believed he was acting unlawfully.[20]

In any event, whether the good faith issue is objective or subjective (or both) does not matter in this case: As the Court of Appeals' careful analysis of the record demonstrates, 700 F.2d at 1171-1173 (Pet. A13-A17), its conclusion that the State failed to show that Detective Leaming acted in good faith was correct, regardless of whether good faith is a subjective or objective issue.

B. The State Failed To Show That Detective Leaming Acted In "Good Faith" When He Purposefully Sought To Obtain Information About The Body Before Respondent Could Reach His Attorney

1. This Court previously has found that Detective Leaming made an agreement with the respondent's attorney, Mr. McKnight, that Leaming would bring the respondent straight back to Des Moines from Davenport without questioning him, 430 U.S. at 391, 410, 415. Albeit only in footnotes, the petitioner (Pet. Br. 27, n.26) and the United States (U.S. Br. 6-7, n.3) attempt to dispute the existence of that agreement. The short answer to this attempt of course is that every court that has reviewed this case, including both this Court (430 U.S. at 391) and the state trial court that presided over the 1969 suppression hearing (*Brewer* App. at 1), has found that the agreement did exist. But the respondent also would note that the record in

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[20] As the United States suggests (U.S. Br. 12), it is true that in *Harlow* v. *Fitzgerald*, ___ U.S. ___, 102 S.Ct. 2727 (1982), this Court eliminated the subjective element of the good faith defense in § 1983 cases. However, this holding was based on considerations relating to summary judgment and pre-trial discovery practice in *civil* cases. 102 S.Ct. at 2737-2739. These considerations do not apply to the criminal process, which does not include a summary judgment procedure or pre-trial discovery.

fact, contains ample support for the existence of the agreement.[21]

2. In the face of the agreement with McKnight, Leaming admittedly embarked on a purposeful effort to elicit as much information as possible from Williams, particularly about the body, before Williams could reach his attorney. 430 U.S. at 399. It is hard to imagine a more flagrant or purposeful violation of the right to counsel: Surely any police officer would (or at least should) realize that he is not permitted to elicit incriminating information from a defendant against whom formal

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[21] The agreement arose during a meeting between McKnight, Leaming, and Des Moines Police Chief Wendell Nichols (*Brewer* App. at 37-38). At the 1969 suppression hearing, Nichols testified that it was his "understanding when Mr. Leaming left that they were going straight to Davenport and bring [Williams] straight back." (*Brewer* App. at 38). Moreover, Nichols conceded that when McKnight later said to Nichols, "I bet you they're questioning Williams and going to stop on the way somewhere to try to discover the body," Nichols "may have" responded that "I hope they don't because we agreed that we would come straight back." (*Brewer* App. at 39). Leaming's own testimony at the 1969 suppression hearing included the following exchanges with McKnight:

> Q: Did you say to me, "We are going to Davenport and bring Mr. Williams straight back to Des Moines and you all wait here."
>
> A: No sir, not *just* like that.
>
> * * *
>
> Q: Now obviously, officer, you had some conversation with me about that any conversation with Mr. Williams would be taken when you got back in your office; don't you remember that?
>
> A: We had some similar conversation of that, but not *just* like that, no.

Brewer App. at 64 (emphasis added).

Especially given the state trial court's explicit doubts about Leaming's candor concerning the agreement (*Brewer* App. at 2), the foregoing responses by Nichols and Leaming provide ample support for that court's finding that there was an agreement (*Brewer* App. at 1). Moreover, it was apparent from McKnight's leading questions that *McKnight*—who was the only other witness to the relevant conversations—was asserting that there was an agreement. In short, with all due respect to Professor Kamisar, his conclusion that the only support in the record for "the agreement" was the officers' silent acquiescence to what McKnight told Williams, *see Foreword:* Brewer v. Williams—*A Hard Look at a Discomfiting Record*, 66 Geo. L.J. 209, 212-213 (1977), is simply incorrect.

judicial proceedings have been commenced before he can reach his attorney—especially when the officer has agreed with the attorney not to question the defendant. In short, "[t]his is not a case where, in Justice Cardozo's words, 'the constable . . . blundered, . . .; rather, it is one where the 'constable' planned an impermissible interference with the right to the assistance of counsel." *United States* v. *Henry*, 447 U.S. 264, 274-75 (1980).[22]

3. The state seeks to justify Leaming's conduct in part by arguing that "Leaming was careful not to *directly* ask Williams questions." (Pet. Br. 26) (emphasis added). But the fact that Leaming did not "directly" ask any questions, apparently in the sense of making any statements with question-marks at the end, does not make any difference for constitutional—or good faith—purposes. For one thing, Leaming's purposeful attempt to elicit information about the body included the following portions of his "Christian burial speech":

> I feel that we could stop and locate the body, that the parents of this little girl should be entitled to a Christian burial for the little girl that was snatched away from them on Christmas [E]ve and murdered. And I feel *we should stop and locate it on the way in [to Des Moines]* rather than waiting until morning. . . .

430 U.S. at 393 (emphasis added). Certainly Leaming could not reasonably have thought that *stating* that "we should stop and locate [the body] on the way in" was any different from asking, "Will you show me where the body is on the way in?"

Moreover, whether or not he "directly" asked questions, Leaming's conduct was constitutionally indistinguishable from

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[22] In its brief in *Brewer* v. *Williams* (pp. 33-35), even the State conceded that Leaming's conduct involved "trickery and deceit." In this regard, it is worth remembering that Leaming's "Christian Burial Speech" obviously was designed to play on the sympathies of the respondent, who Leaming knew to be a "young man with quixotic religious convictions and a history of mental disorders," 430 U.S. at 412, in a manner that would not have been feasible in the presence of counsel.

that involved in *Massiah* v. *United States*, 377 U.S. 201 (1964). *Brewer* v. *Williams*, *supra*, 430 U.S. at 400. *Massiah* did not refer to any questioning by government agents, and held that the defendant's Sixth Amendment rights were violated when the government introduced at trial statements "which federal agents had deliberately *elicited* from him after he had been indicted and in the absence of his counsel." 377 U.S. at 206 (emphasis added). Clearly, Leaming's purpose was to *elicit* information about the body in the absence of Williams' attorney.

4. The petitioner also argues that Leaming could not reasonably have known that his conduct was "clearly unconstitutional" because the defendant in *Massiah* did not know that the person to whom he divulged incriminating information was a government agent. (Pet. Br. 28). This argument seems to be premised on the view that "bad faith" depends on the existence of a prior decision by this Court that is not factually distinguishable in any respect—even a respect that is constitutionally irrelevant. But even if one accepts this premise, the petitioner's *Massiah* argument is without merit, since it ignores *McLeod* v. *Ohio*, 381 U.S. 356 (1965), in which this Court held that a confession was invalid under *Massiah* even though the defendant plainly was aware that he was speaking to police officers. *See Brewer* v. *Williams*, *supra*, 430 U.S. at 400.

5. The United States suggests that the fact that Leaming was "hoping to find out where the little girl was" does not imply bad faith because she had been missing for "only" two days, and "the police could not be certain she was dead." (U.S. Br. at 30). But quite apart from whether a partially humanitarian motive on Leaming's part would have been relevant to the constitutional admissibility of the evidence in question, the United States' suggestion is contradicted by the record. Not only is there no evidence that Leaming hoped to find the victim alive, *see Williams* v. *Nix*, *supra*, 700 F.2d at 1172, but Leaming himself testified that he knew she was dead. (*Brewer* App. at 96-97).

6. The final "good faith" argument by the United States is that "there is an important difference between an intent to elicit information—an activity central to good police work—and an intent to elicit information with knowledge that to do so would violate the suspect's constitutional rights." (U.S. Br. at 30). On its face, this assertion is true enough. However, it ignores the fact that Leaming's admitted intent was not simply to elicit information, but rather to elicit as much information as possible *before Williams reached his attorney*—in violation of an agreeement with that attorney. 430 U.S. at 399. It is this admitted relationship between Leaming's purpose and Williams' attorney that makes it clear that Leaming could not reasonably have thought that his conduct was lawful.[23]

C. The State Had Adequate Notice Of The Good Faith Issue

In Division II(B) of its Argument, the State complains that it did not have notice of the good faith issue in the District Court, and therefore had no opportunity to litigate that issue. This complaint is without merit, since the State in fact had ample notice of the good faith issue—and even argued it on the merits—throughout the proceedings in the District Court and the Court of Appeals:

1. Prior to the filing of the petition for a writ of habeas corpus in the District Court, the Iowa Supreme Court identified "good faith" as an element in its "hypothetical inevitable discovery" doctrine on which the State had the burden of proof. 285 N.W.2d at 260.

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[23] As the Court of Appeals noted, 700 F.2d at 1170 (Pet. at A11-A12), the theory espoused by the State (Pet. Br. at 31) and the Iowa Supreme Court (285 N.W.2d at 260) that Leaming acted in good faith simply because a substantial percentage of the judges and justices who ruled on the validity of the first conviction would not have reversed that conviction is wholly without merit. The fact that judges disagree on the constitutional propriety of police conduct does not *per se* make it legally reasonable or proper. *See, e.g., Ybarra* v. *Illinois*, 444 U.S. 85 (1979); *Coolidge* v. *New Hampshire*, 403 U.S. 433 (1971).

2. The respondent's initial memorandum in the District Court raised the lack-of-bad faith element of the Iowa Supreme Court's hypothetical inevitable discovery test. (App. 175). Moreover, in urging that this Court's decision in *Brown* v. *Illinois*, 422 U.S. 590 (1975), required reversal of the Iowa Supreme Court's inevitable discovery decision, the respondent argued in the District Court that Leaming's conduct was a flagrant violation of his rights. (App. 175-76). Since "flagrancy" is simply the opposite of "good faith," *Dunaway* v. *New York*, 442 U.S. 200, 221, 226 (1979), *State* v. *Williams*, 285 N.W.2d 248, 259 (Ia. 1979), this argument certainly gave notice that Leaming's lack of good faith was an issue.[24]

3. The State explicitly dealt with the "good faith" issue in its initial brief in the District Court, arguing that Detective Leaming did act in "good faith." (App. 179-81).

4. Although Williams' opening brief in the Court of Appeals argued that Detective Leaming did not act in good faith (App. 184), the State at no time complained that it had not received notice of that issue in the District Court. Instead, the State's Brief in the Court of Appeals directly addressed the "good faith" issue on its merits (App. 186-89). Moreover, at oral argument counsel for the State explicitly and repeatedly took the position that the State *should* have the burden of establishing good faith, and that the State had done so. 700 F.2d at 1169, n.5, 1174-1175 (Pet. at A10, n.5, A24-A26).

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[24] The State goes to great lengths to argue that the respondent's *Brown* v. *Illinois* "flagrancy" argument in the District Court did not give notice of the good faith issue because that argument was not repeated in a later section concerning the application of the Iowa Supreme Court's hypothetical-probable-discovery doctrine: (Pet. Br. at 33, n.36). While the respondent might defend the absence of such repetition on the ground that it would only have made already-lengthy (86 legal pages) briefing even more unwieldly, he is willing to concede that his District Court advocacy would have been more effective with the repetition suggested by the State. Nevertheless, this purely organizational point does not change either the fact that the respondent's District Court briefing did give notice that Leaming's good faith was an issue, or the fact that the State actually addressed that issue on the merits in both the District Court and the Court of Appeals.

5. In sum, the State had ample notice that Leaming's good faith was an issue, and consistently pursued the strategy in the District Court and the Court of Appeals of arguing that good faith was established on the record before the courts.[25]

6. Finally, it should be noted that an opportunity to present evidence on good faith is necessary only if good faith is an issue. As this Brief previously has demonstrated, especially in the Sixth Amendment right-to-counsel context, good faith is not an issue because the hypothetical-probable-discovery doctrine itself is invalid.

V. EVEN UNDER THE BROADEST POSSIBLE HYPOTHETICAL-PROBABLE-DISCOVERY DOCTRINE, THE EVIDENCE AT ISSUE IN THIS CASE WOULD NOT BE ADMISSIBLE

This brief has shown that the hypothetical-probable-discovery doctrine, in any form, is inconsistent with the Sixth Amendment right to counsel involved in this case, and that effectuation of that right required exclusion of the evidence at issue from the respondent's trial. Moreover, this brief has demonstrated that even if the petitioner's "independent inevitable discovery" doctrine and the Iowa Supreme Court's "good faith inevitable discovery" doctrine were valid, neither of them would render the evidence in this case admissible. This Division of the Argument will show that even under the broadest possible version of the hypothetical-probable-discovery doctrine, the evidence still would not be admissible, since the State failed to show that the evidence probably would have been discovered in the absence of the violation of the respondent's right to counsel.

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[25] As the United States recognizes (U.S. Br. at 30-31 n.13), even if there were any substance to the State's opportunity-to-present-evidence argument, it would apply only to the issue of subjective good faith—and not to the issue of *objective* good faith, which both parties agree must be established if good faith is to be an issue at all. Moreover, even with regard to subjective good faith, the State suggests no additional evidence that it might offer on remand.

In concluding that the victim's body, and the evidence connected therewith, probably would have been discovered "in any event," the Iowa Supreme Court found (A) that an organized search for the victim would have extended into the area of Polk County where the body was found, and (B) that the searchers would have seen the body because it was "highly visible. 285 N.W.2d at 262, Pet. A48-A49. Even under a "preponderance of the evidence" standard,[28] however, neither of these conclusions was correct in light of the record developed in the District Court.

A. Division III(C), *supra*, has already discussed in some detail the record in this case concerning the organized search for the victim's body. That discussion shows that the reports of the Iowa BCI agents who were in charge of the search reflected that the search was only planned for Poweshiek and Jasper Counties, and that the agents made preparations to search only in those counties. Moreover, the agents abandoned the search at 3:00 p.m., just as it reached the Jasper/Polk County border—the end of the planned search area—in order to follow Detective Leaming west on Interstate 80, having made no provisions for continuing the search into Polk County, where the body was located. At that time, the respondent had not indicated that he would take Leaming to the body.

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[28] Given the Sixth Amendment context of this case, the "preponderance" burden used by the Iowa Supreme Court was inconsistent with *United States* v. *Wade*, 388 U.S. 218 (1967), which held that when a witness identifies a defendant at a post-indictment line-up in the absence of the defendant's counsel, the government must show that any subsequent in-court identification in fact was independent of the pre-trial identification, by clear and convincing evidence. Since the "inevitable discovery" doctrine at best involves more speculation, and is potentially more destructive of the functions of the Sixth Amendment right to counsel, than the "independent source" and "attenuation" doctrines referred to in *Wade*, the holding in *Wade* requires, *a fortiori*, that if any "inevitable discovery" doctrine is to be applied here, the State must show that the hypothetical discovery would have occurred by clear and convincing evidence. However, this is an issue that need not be reached in this case in light of the analysis that follows.

In finding that the BCI search eventually would have been resumed and continued into Polk County, the Iowa Supreme Court relied entirely on Agent Ruxlow's testimony to that effect. 285 N.W.2d at 262, Pet. A48. However, unbeknownst to that court, Ruxlow had been told by the prosecution that the purpose of his testimony was to show that the body would have been discovered, and Ruxlow had testified falsely about a highly material photograph of the body. Moreover, the facts discussed in the preceding paragraph belie Ruxlow's testimony.

Obviously, if Ruxlow had intended to continue the search into Polk County, it would not have made sense for him to abandon the search to follow Leaming, for no known purpose, when there were still two hours of daylight left and a group of searchers was already organized and available. Especially in light of all the other circumstances, including Ruxlow and Mayer's BCI reports, the fact that Ruxlow and Mayer left Grinnell precisely at the time that the search of Jasper County was being concluded is too "neat" a coincidence to be explainable on any other basis than that their continuing intent was to search only Poweshiek and Jasper Counties. And the explanation that the search would have been resumed if Williams had not led the police to the body is not credible given that the search was abandoned *before* Williams indicated he would do so. Certainly the prosecution did not meet *its* burden of showing, even by a preponderance of the evidence, that the search would have continued into Polk County.

B. Even if the search *had* extended into Polk County, the record demonstrates that the searchers would not have found the body, for two main reasons:

1. Even if the searchers had left their vehicles to search on foot, they would not have seen the body, which was completely hidden under a cover of snow and brush. This conclusion is supported not only by Habeas Exhibit 1 (App. 106), but by the difficulty the police had in locating the body even after Williams led them to where it was located (App. 95-96).

In finding that the body *would* have been visible to the searchers, the Iowa Supreme Court relied on the only two photographic exhibits then in the record, Habeas Exhibits 3 and 5 (App. 107, 108), which that court believed showed the body as it appeared when the police first discovered it with Williams' help:

> The State also introduced photographs showing the body as it was *actually found*. These photographs show that Pamela Power's body would not have been hidden by the inch of snow which accumulated in the area in the evening of December 26 . . . In addition the left leg of the body was poised midair, where it would not have been readily covered by a subsequent snowfall.

State v. *Williams*, *supra*, 285 N.W.2d at 262, Pet. A48-49 (emphasis added). The court apparently based this belief on Ruxlow's testimony at the suppression hearing that Exhibit 5 showed the body exactly as it was found. (App. 39).[27]

However, additional evidence introduced in the District Court established beyond question that Exhibits 3 and 5 did *not* show the body as it was found, and thus that the Iowa Supreme Court's belief was incorrect. In the habeas corpus proceeding, Ruxlow conceded that Exhibit 5 was taken after the scene had been altered and snow had been removed. (App. 139-40). Quite apart from this concession, Exhibit 1—which was not available to the defense in the state court proceedings (App. 98-101, 103-105)—demonstrated clearly that Exhibit 5 could not possibly show the body as it was found: While Exhibit 5 shows the body almost completely exposed to view, Exhibit 1 shows the body completely covered with a blanket of snow and obscured by brush. (App. 106, 108).[28]

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[27] Mr. Ruxlow's suppression testimony refers to State's Exhibits C and D. These were introduced in the District Court as Petitioner's Exhibits 3 and 5 (App. 107, 108).

[28] The record also demonstrates that Exhibit 3 (Ex. C at the 1977 suppression hearing; App. 102)—on which the District Court apparently relied in concluding that the victim's "face and part of her brightly colored shirt" were not covered by snow, Pet. at A80—did not show the body as it was found.

(Cont. next page)

2. The preceding paragraphs show that it is unlikely the body would have been discovered even *assuming* that searchers would have exited their vehicles at the spot where the body was located. The record shows, however, that even this assumption is unwarranted. Ruxlow testified that the searchers generally searched from their vehicles: *if* they saw a "culvert or any out-building of an abandoned farm," they were supposed to get out of their cars. (App. 44-45, 50-51). Habeas Exhibits 7, 8 and 9 (App. 109-111) were photographs taken from the road approaching the culvert where the body was located. Although all of these photographs include the location of the culvert, it is not visible in any of them. The searchers therefore would not have left their cars to search, and would not have found the body even if it had been more visible than Exhibit 1 shows it was.

C. Since the conclusion that the State did not demonstrate that the body would have been discovered in the absence of the violation of Williams' constitutional rights is contrary to that reached by the Iowa Supreme Court, some brief attention to 28 U.S.C. § 2254(d) is appropriate. Normally, state court factual findings are entitled to a presumption of correctness in a federal habeas corpus proceeding. 28 U.S.C. § 2254(d); *Sumner* v. *Mata*, 449 U.S. 539 (1981). However, this presumption of correctness does not apply when "the material facts were not adequately developed at the state court hearing" or when the petitioner "did not receive a full, fair and adequate hearing in the state court proceeding . . . ." 28 U.S.C. § 2254(d)(3), (6); *Townsend* v. *Sain*, 372 U.S. 293 (1963).

Given the additional evidence presented in the District Court, both of these exceptions apply. Habeas Exhibit 1 (App. 106) and Ruxlow's habeas testimony made it clear that the

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After the body was found, a police officer took a single initial photograph of the body as it then appeared. After this first photograph was taken, the body was moved and the scene was altered. (App. 124). Exhibit 1, in which the body is virtually indiscernible, must be the single initial photograph. Thus, Exhibit 3 must have been taken after the scene had been disturbed.

Iowa Supreme Court had relied on false and highly misleading testimony in finding that the body was visible. Moreover, Ruxlow's false testimony at the suppression hearing concerning Habeas Exhibit 5 (App. 108)—which was disclosed for the first time in the District Court—reflected on his credibility on other matters, including the intended scope of the search effort. Finally, the state courts were not presented with Habeas Exhibits 7-9, 11, 12, or 16 (App. 109-122, 126-170)—all of which indicated that the victim's body would not have been found.

VI. *STONE V. POWELL* DOES NOT PRECLUDE REVIEW ON THE MERITS IN THIS CASE

The petitioner and one of his *amici* argue that this Court should extend the reach of *Stone* v. *Powell*, 428 U.S. 465 (1976), from Fourth Amendment cases to Sixth Amendment cases such as this one, so as to preclude review on the merits. (Pet. Br. 35-40; Ill. Br. 4-12). This argument should be rejected for three independently sufficient reasons: (A) Extension of *Stone* v. *Powell* to this case would be inconsistent with Sixth Amendment right to counsel; (B) *Stone* v. *Powell* should not be applied to cases in which the underlying state court decision is based on a new exception to the exclusionary rule; and (C) the respondent did not have a full and fair opportunity to litigate the merits in state court.

A. For reasons that are closely related to the reasons why a hypothetical-probable-discovery doctrine could not be constitutionally applied in this case, the holding and rationale of *Stone* v. *Powell*, *supra*, do not apply to this case because it involves a violation of the Sixth Amendment right to counsel during post-initiation interrogation.

1. In *Stone* v. *Powell*, this Court held that a state prisoner who had been afforded a full and fair opportunity to litigate Fourth Amendment exclusionary-rule claims in the state courts could not relitigate those claims in a federal habeas corpus proceeding. This holding was carefully limited to its Fourth Amendment context. Thus, this Court emphasized

that its decision was "*not* concerned with the scope of the habeas corpus statute as authority for litigating constitutional claims generally," 428 U.S. at 493-494, n.97, and based its entire analysis on the "nature and purpose of the Fourth Amendment exclusionary rule . . . ." *Id.* at 481, 482-495. The *Stone* opinion specifically noted the very limited role of the "imperative of judicial integrity" in Fourth Amendment exclusionary rule cases, *id.* at 484-85, and made it clear that the Fourth Amendment exclusionary rule "is not a personal constitutional right" that is calculated to redress injury to any particular defendant in relation to the criminal judicial process. Rather, "the rule is a judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect . . . ." *Id.* at 486, *quoting United States* v. *Calandra*, 414 U.S. 338, 348 (1974). Given this primarily deterrent purpose of the Fourth Amendment exclusionary rule, permitting relitigation of Fourth Amendment claims in a federal habeas corpus proceeding after a full and fair opportunity to litigate those claims in state court is not justified because the incremental deterrent effect of doing so, if any, would be too slight to outweigh the resulting social costs. 428 U.S. at 493.

2. As Division I of the Argument, *supra*, has already demonstrated, the deterrence/balancing analysis on which *Stone* is based is not applicable to cases involving violations of the Sixth Amendment right to counsel. Unlike the Fourth Amendment's prohibition against unreasonable searches and seizures, which is designed to protect rights wholly outside the criminal trial process, the right to counsel, even at a critical *pre*-trial stage such as interrogation, is designed to protect the personal right of each defendant to a fair *trial*, and the Sixth Amendment "exclusionary rule" is an integral and indispensable aspect of that right. When evidence obtained in violation of a defendant's right to have counsel during interrogation is admitted at trial, that defendant's personal constitutional rights are violated, and the judicial process by which that defendant is convicted is rendered unfair and unconstitutional. Consequently, *Stone*'s deterrence/balancing rationale is inapplica-

ble to Sixth Amendment right-to-counsel violations, and federal habeas corpus remains available to remedy such violations. Schulhofer, *Confessions and the Court*, 79 Mich. L.Rev. 861, 889-90 (1981); *see also United States* v. *Henry*, 447 U.S. 264 (1980).

3. The petitioner's argument for the extension of *Stone* v. *Powell*, *supra*, to the instant case is premised on the assertion that the rationale of *Stone* applies whenever the issue is the admission of "highly probative reliable physical evidence," apparently because the police "will be adequately deterred by the possibility of losing convictions on direct appeal." The petitioner suggests that Fifth and Sixth Amendment violations differ from Fourth Amendment violations only in that they "are generally not linked with highly probative and reliable physical evidence," and that the applicability of *Stone* should turn on "the nature of the evidence gathered, not the type of constitutional violation which occurred." (Pet. Br. 36-37). This argument is flawed in several independently fatal respects:

a. First, and most importantly, in focusing exclusively on the deterrent purposes of the exclusionary rule, and in suggesting that Sixth Amendment violations differ from Fourth Amendment violations only in terms of the kind of evidence they "generally" produce, the petitioner ignores the consequences of the fundamental non-deterrent purposes of the Sixth Amendment exclusionary rule just discussed above.

b. Second, the petitioner's argument depends on the notion that if evidence that is obtained as a result of a violation of a defendant's right to counsel is "probative" and "reliable," admission of that evidence does not affect the fairness or integrity of the trial. (Pet. Br. 34-38). The problem is that this notion is simply incorrect: The right, following the initiation of formal adversary proceedings, to have the assistance of counsel during attempts by the police to elicit information from the defendant for use at trial is aimed at protecting the defendant from providing such information without the advice of a skilled representative who can evaluate the impact of doing so on the

trial process—whether or not the information is "probative" or "reliable." *Brewer* v. *Williams*, 430 U.S. 387 (1977); *Massiah* v. *United States*, 377 U.S. 201 (1964); *United States* v. *Henry*, 447 U.S. 264 (1980).

C. Finally, the petitioner's underlying premise that habeas corpus review is precluded whenever the claimed constitutional error has had no impact on the reliability or accuracy of fact finding is directly contradicted by this Court's holding in *Rose* v. *Mitchell*, 443 U.S. 545 (1979). In *Rose*, this Court reviewed claims by state prisoners that their convictions were invalid because of racial discrimination in the selection of grand jury foremen. These claims did not in any way implicate the reliability of the fact-finding processes (i.e., the trials) by which the defendants had been found guilty. Nevertheless, the Court declined to extend *Stone* beyond its "limited reach," noting *(inter alia)* (a) that *Rose* involved claims of violations of personal rights, and (b) that the judicial integrity concerns and constitutional interests were more compelling than in *Stone* because the claimed violations struck at "core concerns of the Fourteenth Amendment and at fundamental values of our society and our legal system." 443 U.S. at 560, 563, 564. While *Rose* is of course different from this case in the sense that it does not involve the admissibility of evidence, it nevertheless makes it clear that an attack on the reliability of the fact-finding aspects of the criminal process is not a *sine qua non* of federal habeas corpus review.[29]

4. Both this Court's narrow Fourth Amendment deterrence analysis in *Stone* —which this Court made clear was not a decision involving the scope of habeas corpus review

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[29] The respondent would also note that the petitioner's suggestion that the availability of habeas review should turn on the type of evidence in question would be unworkable as a practical matter. For example, how would a federal court decide whether evidence was "highly" probative or "reliable?" At best, the habeas court would have to engage in a wide-ranging review of the entire record relative to the defendant's guilt, with only the vaguest of standards to guide it.

generally—and this Court's holding in *Rose* v. *Mitchell*, *supra*, reflect the fact that the central purpose of federal habeas corpus review is to correct constitutional errors in the judicial process by means of which criminal defendants are prosecuted.[30] In short, the focus of habeas corpus review is on the legality of the governmental process by which the prisoner's confinement was produced, not on the defendant's guilt or innocence. *See Rogers* v. *Richmond*, 365 U.S. 534, 541-46 (1961); Boyte, *Federal Habeas Corpus After Stone* v. *Powell; A Remedy Only for the Arguably Innocent?*, 11 U. Rich. L.Rev. 291, 321-330 (1977). As the preceding paragraphs demonstrate, a claim that the defendant's Sixth Amendment right to counsel during interrogation was violated is precisely the sort of challenge to the legality of the process leading to conviction that is within the scope of habeas corpus.[31]

B. Even if this were a Fourth Amendment case, *Stone* v. *Powell* would not apply, because the decision of the Iowa Supreme Court was based on a previously unrecognized exception to the exclusionary rule that would have a serious negative impact on that rule's deterrent effect.

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[30] The *Stone* opinion's analysis of the historical development of federal habeas corpus review of state convictions shows that such review at first was restricted to the "jurisdiction" of the sentencing court. 428 U.S. at 475. Of course, the scope of habeas corpus review subsequently was expanded to include other challenges to the constitutionality of the process leading to conviction. *See, e.g., Brown* v. *Allen*, 344 U.S. 443, 482-87 (1953). But even then, habeas corpus was not available to review claims that newly discovered evidence showed that the defendant was innocent. *Townsend* v. *Sain*, 372 U.S. 293, 317 (1963).

[31] Consistently with the analysis above, every federal circuit court faced with the issue has declined to extend *Stone* v. *Powell* to Fifth and Sixth Amendment claims. *See White* v. *Finkbeiner*, 687 F.2d 885 (7th Cir. 1982); *Hinman* v. *McCarthy*, 676 F.2d 343, 348-49 (9th Cir.), *cert. denied*, 103 S.Ct. 468 (1982); *Patterson* v. *Warden*, 624 F.2d 69, 70 (9th Cir. 1980); *Harryman* v. *Estelle*, 616 F.2d 870, 872 (5th Cir.), *cert. denied*, 449 U.S. 860 (1980); *Morgan* v. *Hall*, 569 F.2d 1161, 1168-69 (1st Cir.), *cert. denied*, 437 U.S. 910 (1978).

1. In *Stone*, the defendants claimed that the state courts had misapplied established Fourth Amendment doctrine to the facts of their respective case; no claim was made that the state courts had established new rules of law that were inconsistent with this Court's decisions or the Fourth Amendment. As the holding in *Stone* indicates, federal habeas corpus review of claims that the state courts have misapplied established Fourth Amendment doctrine in particular fact contexts would not significantly promote the deterrent function of the Fourth Amendment exclusionary rule. For one thing, a police officer who is contemplating conduct that would violate the Fourth Amendment would be unlikely to be deterred by the speculative prospect that the state courts would misapply Fourth Amendment doctrine to that conduct, but that a federal court would later correct the mistake. In addition, a state court's incorrect application of Fourth Amendment doctrine to the particular facts of any given case is unlikely to encourage misconduct by police officers in future cases, since the factual contexts of search-and-seizure cases tend to be so varied as to make each of them *sui generis*.

2. The decision of the Iowa Supreme Court in this case was of a very different sort from the state court decisions involved in *Stone* v. *Powell*. The Iowa court's holding was based, not on accepted Sixth Amendment doctrine, but on a broad new exception to the exclusionary rule that neither that court nor this Court previously had recognized. 285 N.W. 2d at 255-260, Pet. A35-A45. As Division II, *supra*, has demonstrated, if this new exception to the exclusionary rule were allowed to stand, it would provide a significant incentive for police misconduct in the future. Hence, this case, unlike *Stone*, is one in which precluding federal habeas corpus review—and correction—of the state court's decision would result in serious harm to the deterrent effect of the exclusionary rule in the future. Given this fact, the rationale of *Stone* would not apply here even if this were a Fourth Amendment/deterrence case.

C. Under *Stone* v. *Powell*, federal habeas corpus review of Fourth Amendment claims is barred only if the defendant has

had a "full and fair" opportunity to litigate those claims in the state courts. 428 U.S. at 481-82. With regard to the hypothetical-probable-discovery issue in this case, the respondent did not have such an opportunity. As Division IV, *supra*, has discussed in some detail, additional evidence presented in the District Court demonstrated that the Iowa Supreme Court, in concluding that the State had shown the body more likely than not would have been discovered "in any event," relied on testimony that was false and seriously misleading. Especially since it was the State that was responsible for the Iowa Supreme Court's misapprehension of the facts, it cannot be said that the respondent had a full and fair opportunity to litigate the suppression issue.[32] Consequently, whether *Stone* should be extended beyond its Fourth Amendment context in this case is a moot issue which this Court need not decide.

D. Notwithstanding the sufficiency of the points just made above, the assertion made by *amicus curiae* State of Illinois in connection with the *Stone* v. *Powell* issue that "Respondent's guilt was not in question" (Ill Br. at 11) warrants some response, in light of its complete inaccuracy. While the Respondent's guilt may not have seemed to be in question when this case first reached this Court, *see* 430 U.S. at 428, 437, 441, it most certainly *is* in question now. As the Court of Appeals noted, 700 F.2d at 1168, Pet. at A7-A8, the respondent's defense at the second trial—that someone else killed the victim and placed her body in his room—was supported by substantial physical evidence indicating that the perpetrator, unlike the respondent, was sterile. Moreover, other evidence that inexplicably was not presented by defense counsel at trial, but which was presented to the District Court in this proceeding

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[32] The fact that the state trial judge who heard the motion to suppress expected to be reversed on appeal, apparently because of what he regarded as the less-than-adequate record made by the prosecution (App. 173), also is relevant to the "full and fair opportunity" issue.

with reference to one of the issues not addressed by the Court of Appeals, also strongly supported the respondent's defense.[3]

CONCLUSION

The evidence at issue in this case was obtained as a direct result of Detective Learning's purposeful violation of the respondent's Sixth Amendment right to counsel, and was precisely the sort of evidence that Learning sought. Consequently, this case is constitutionally indistinguishable from its predecessor, *Brewer* v. *Williams*, *supra*. This result cannot be altered by reference to any hypothetical-probable-discovery doctrine. Even if one assumed, albeit incorrectly,

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[3] That evidence consisted of the pre-trial deposition testimony of Richard Boucher, who was a resident of the Des Moines YMCA on the day of the crime. At about the time of the crime, Mr. Boucher heard suspicious belligerent noises from the room next to his; he recognized the voice of Albert Bowers, a maintenance man who was responsible for cleaning restrooms and residence rooms at the YMCA. Mr. Boucher later saw Bowers taking suitcases into his room, and then heard sounds of packing. When Mr. Boucher and a police officer went to Bowers' room to ask him not to leave, Bowers indicated he was not going anywhere. However, his bags were hidden under his bed, and he left the YMCA shortly thereafter. Boucher subsequently found a towel in Bowers' room that appeared to have bloodstains on it. (Iowa Supreme Court Appendix, also introduced in the District Court, at 153-174).

Incredibly, the Boucher testimony was not offered at trial. In his Reply to the Brief in Opposition, the petitioner suggests that this was because "the State exhumed the body of Bowers and was prepared to offer medical testimony that Bowers was virile [sic]." (Reply at 4, n.2). But quite apart from the fact that it was the *defense* that exhumed Bowers' body—and then volunteered the results of its expert's sterility test to the prosecution—Bowers' apparent nonsterility does not affect the relevance of the Boucher testimony. Of course, if the jury concluded that the perpetrator was sterile, the Boucher testimony would have been of relatively little value—but then the respondent could not have been guilty. On the other hand, if the jury accepted the prosecution's position at trial that the absence of sperm in the semen found on the body was explainable by the annihilation of the sperm by the effects of freezing temperatures—even though that position was inconsistent with its position at the motion to suppress (App. 58-74)—the Boucher testimony would have been powerfully supportive of the respondent's defense.

that the evidence in this case probably *would* have been discovered through lawful means anyway, that hypothetical conclusion would not undo the Sixth Amendment violation that occurred when the evidence in *fact* was obtained through Leaming's misconduct and then used at the respondent's trial. From a more pragmatic perspective, when it really is the case that evidence is discoverable through lawful means, the police can and should *use* those means—rather than violate the Sixth Amendment and then ask the courts to engage in a time-consuming and speculative inquiry into what might have been so that they may have the benefit of the violation.

The judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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